

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JULIO TORRES

Claimant

VS.

BAILEY'S SCRAP IRON, INC.

Respondent

AND

COMMERCIAL UNION INSURANCE COMPANIES

Insurance Carrier

Docket No. 237,209

ORDER

Respondent appealed Administrative Law Judge Brad E. Avery's August 13, 1999, Award. The Appeals Board heard oral argument in Topeka, Kansas, on January 5, 2000.

APPEARANCES

Claimant appeared by his attorney, George H. Pearson of Topeka, Kansas. The respondent and its insurance carrier appeared by their attorney, Kip A. Kubin of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

On August 18, 1998, claimant suffered burns to his face, right arm, and left arm while employed by the respondent. The claimant's left arm suffered the most severe burn. The only issue in dispute and before the Appeals Board for review is the number of weeks that claimant proved he was temporarily and totally disabled. The Administrative Law Judge found claimant was temporarily and totally disabled from August 18 to September 4, 1998, and from September 16 to November 4, 1998. The Administrative Law Judge also

found the respondent was entitled to a \$600.00 credit for four weeks of temporarily total disability benefits paid while respondent provided claimant with accommodated employment at full wages.

Respondent contends there is no competent medical evidence contained in the record to prove that claimant was temporarily and totally disabled for 7.14 weeks from September 16, 1998, to November 4, 1998.

Claimant, on the other hand, contends he proved he was temporarily and totally disabled from August 18, 1998, through November 4, 1998, with the exception of the four weeks respondent provided claimant with accommodated work at full wages. Therefore, claimant argues he is entitled to 11.28 weeks of temporary total disability benefits at the rate of \$150 per week or \$1,692 minus the \$600 credit for the temporary total disability benefits paid during the four weeks respondent provided claimant with accommodated work at full wages.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

After claimant's August 18, 1998, accident, respondent returned claimant to accommodated work for two or three days per week at full wages. Four payroll checks made out to the claimant were admitted into evidence at the regular hearing. Those checks prove that claimant was paid for four weeks of work at \$207.75 per week for a total of \$831. Respondent's owner, Daniel D. Bailey, Sr., testified that after claimant's August 18, 1998, accident he provided claimant with accommodated work in the office and paid claimant full wages. The record is not clear as to the last day claimant worked at the accommodated employment. Mr. Bailey testified claimant's last day worked was September 15, 1998, and claimant testified it was September 16, 1998. But the payroll checks admitted into evidence indicate that claimant's last day worked would have been Friday, September 11, 1998.

Claimant testified, at one point during the regular hearing, that after the accident, he did not continue to work for the respondent because Mr. Bailey wanted to talk to him. Claimant then testified he did not continue to work because he had a medical restriction that would not allow him to work in the sun. The only medical restriction admitted into evidence, without objection, was the note from the Marion Clinic dated September 4, 1998, that restricted claimant from exposure to dust and dirt until the burn healed.

Mr. Bailey testified, after claimant's August 18, 1998, accident, he had claimant performing accommodated work in his office. One day claimant did not show up for work and claimant did not notify Mr. Bailey the reason that he had left work. Mr. Bailey also

testified he would have continued to accommodate claimant if he would have returned to work.

During oral argument before the Appeals Board, the parties stipulated that respondent's insurance carrier had paid claimant 11 weeks of temporary total disability benefits at \$150 per week for a total of \$1,650. Respondent also paid claimant wages for four weeks at \$207.75 per week for a total of \$831.

The Appeals Board finds the record as a whole has established that after claimant's August 18, 1998, accident respondent returned claimant to accommodated work at full wages for four weeks. Claimant left the accommodated work voluntarily after September 11, 1998, without giving the respondent an opportunity to continue him in accommodated job. Respondent's owner, Mr. Bailey, established through his testimony that he would have continued claimant in the accommodated job if he had returned to work. There is no medical evidence contained in the record that claimant could not temporarily perform substantial gainful employment. Claimant claims he was restricted from working in the sun, but the medical note from the Marion Clinic indicates that claimant was restricted from exposure to dirt and dust. There is also no evidence in the record that claimant could not have continued the accommodated employment in the office that respondent had made available to claimant.

The Appeals Board concludes that from the date of claimant's accident, August 18, 1998, until his last day worked, September 11, 1998, claimant was performing accommodated work and earning full wages. Therefore, he was not temporarily and totally disabled during that period. Then from September 12, 1998, until claimant was released to return to work without restrictions on November 4, 1998, claimant was only restricted from working in dirt and dust. Even if claimant was also restricted from working in the sun, respondent established it would have continued to accommodate claimant in a work environment within those temporary restrictions. Therefore, claimant was also not temporarily and totally disabled during that period.

Accordingly, the Appeals Board finds claimant has not proven he was temporarily and totally disabled and the respondent is entitled to a credit against the Award for the \$1,650 of temporary total disability benefits paid to claimant.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Administrative Law Judge Brad E. Avery's August 13, 1999, Award should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Julio Torres,

and against the respondent, Bailey's Scrap Iron, Inc., and its insurance carrier, Commercial Union Insurance Companies, for an accidental injury that occurred on August 18, 1998, and based upon an average weekly wage of \$225.00.

The claimant is entitled to 18.68 weeks of permanent partial disability compensation at \$150.01 per week for a total award of \$2,802.19 for a 4.5 percent permanent partial general disability which is all due and owing and is ordered paid in one lump sum less amounts previously paid.

Claimant is entitled to future medical treatment upon application to and approval of the Director.

Claimant is entitled unauthorized medical expenses up to the statutory limit upon proper presentation of a statement to the respondent.

All authorized medical expenses are ordered paid by the respondent.

All other orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson III, Topeka, KS
Kip A. Kubin, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director